

ACQUISITION LETTER

AUTHORITY

This Acquisition Letter is issued by the Procurement Executive pursuant to a delegation from the Secretary and under the authority of the Federal Acquisition Regulation (FAR), Section 1.301(a)(2).

CONTENTS

CITATION

TITLE

FAR Subpart 9.104, 9.105
DEAR Subpart 970.09

Determinations and documentation
Management controls

Subject: Guarantee of Performance

- I. **Purpose.** The purpose of this Acquisition Letter (AL) is to provide contracting officers with guidance in making a determination of responsibility on the assets of another corporate entity where the prospective contractor is newly organized or otherwise lacks financial resources.

This revision of AL 98-05 corrects typographical errors contained in the model Performance Guarantee Agreement distributed as part of that AL. The corrections have been made in bold type in the model attached to this revision. The date of issuance has not been changed.

- II. **Background.** The Department of Energy contracts with entities that have been created by an already existing corporate entity or entities solely for the purpose of performing a specific contract. This occurs with the award of most management and operating contracts. This situation can occur in the award of contracts that are not management and operating contracts where the prospective awardee is created for performance of the instant contract, for example, where a joint venture or similar legally binding corporate partnership is created in other types of contracts. The Government's interests must be protected if the financial and other resources of a potential awardee necessary to establish financial responsibility are owned or controlled by a parent corporate entity or other entity.

- III. **Guidance.** Prior to award of any contract, the contracting officer must make a responsibility determination, including consideration of whether the new entity will have sufficient financial and other resources available to it to carry out performance of the prospective contract, including any liabilities it could incur to the Department under the terms of the contract.

payment of which by Contractor is in default under the Contract or under any other document(s) or instrument(s) executed by Contractor as aforesaid, and that Guarantor will, upon demand, perform all other obligations of Contractor, the performance of which by Contractor is guaranteed hereunder.

Guarantor agrees to assure that it shall cause this Performance Guarantee Agreement to be unconditionally binding upon any successor(s) to its interests regardless of (i) the reorganization, merger, or consolidation of Guarantor into or with another entity, corporate or otherwise, or the liquidation or dissolution of Guarantor, or the sale or other disposition of all or substantially all of the capital stock, business, or assets of Guarantor to any other person or party, or (ii) the institution of any bankruptcy, reorganization, insolvency, debt agreement, or receivership proceedings by or against Guarantor, or adjudication of Guarantor as a bankrupt.

Guarantor further warrants and represents to the Government that the execution and delivery of this Performance Guarantee Agreement is not in contravention of Guarantor's Articles of Organization, Charter, by-laws, and applicable law; that the execution and delivery of this Performance Guarantee Agreement, and the performance thereof, has been duly authorized by the Guarantor's Board of Directors, Trustees, or any other management board which is required to participate in such decisions; and that the execution, delivery, and performance of this Performance Guarantee Agreement will not result in a breach of, or constitute a default under, any loan agreement, indenture, or contract to which Guarantor is a party or by or under which it is bound.

No express or implied provision, warranty, representation or term of this Performance Guarantee Agreement is intended, or is to be construed, to confer upon any third person(s) any rights or remedies whatsoever, except as expressly provided in this Performance Guarantee Agreement.

In witness thereof, Guarantor has caused this Performance Guarantee Agreement to be executed by its duly authorized officer, and its corporate seal to be affixed hereto on

NAME OF CORPORATION

NAME AND POSITION OF OFFICIAL
EXECUTING PERFORMANCE
GUARANTEE AGREEMENT ON
BEHALF OF GUARANTOR

ATTESTATION INCLUDING APPLICATION
OF SEAL BY AN OFFICIAL OF
GUARANTOR AUTHORIZED TO AFFIX
CORPORATE SEAL

Model Solicitation Provision

AL 98-05 Guarantee of Performance.

The successful proposer is required by other provisions of this solicitation to organize a dedicated corporate entity to carry out the work under the contract to be awarded as a result of this solicitation. The successful proposer will be required, as part of the determination of responsibility of the newly organized, dedicated corporate entity and as a condition of the award of the contract to that entity, to execute a guarantee of that entity's performance. That guarantee of performance must be satisfactory in all respects to the Department of Energy.